IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 660

BURLEY IRRIGATION DISTRICT, a corporation, *Petitioner.*

v.

HAROLD L. ICKES, Secretary of the Interior.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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PETITION.

MAY IT PLEASE THE COURT: The petition of the Burley Irrigation District respectfully shows to this Honorable Court:

STATEMENT OF THE MATTER INVOLVED.

This litigation is the culmination of a long train of events, extending over twenty years. In 1904 the Minidoka Reclamation Project on the Snake River, Idaho, was approved by the Secretary of the Interior (R. p. 336). It was thereafter divided into two divisions: Gravity Division (now Minidoka Irrigation District) and Pumping Division (now Burley Irrigation District). Because the lands now constituting the Burley Irrigation District (petitioner) were topographically higher than the level of the river, a power

plant was necessary to pump the water to the level of the land (Pl. Ex. 1, pp. 151, 156). Ninety-five and six-tenths per cent of the cost of the power plant was charged to the water users in what is now the Burley Irrigation District (Pl. Ex. 1, pp. 152, 157, 158). Subsequently the plant yielded profits from the sale of power for commercial purposes (R. pp. 16, 99 par. 20; R. p. 336). In the year 1927, the then Secretary of the Interior, being authorized by statute to determine the person to whom such profits should be credited, determined that since the water users in the Burley Irrigation District were charged with ninety-five and six-tenths per cent of the cost of the power plant, they became, equitably speaking, the owners of ninety-five and six-tenths per cent of the power plant, and were entitled to have ninety-five and six-tenths per cent of the profits from the sale of power credited to the Burley Irrigation District. A later Secretary reaffirmed this ruling (Pl. Ex. 1, pp. 166-169). Thereafter, in the year 1929, the Minidoka Irrigation District attempted to procure a redistribution of the construction costs and thus to achieve a greater participation in the profits from the power plant (Pl. Ex. 1, pp. 44, 170, 171). Litigation ensued, as a result of which the Court of Appeals for the District of Columbia held that the rights of the Burley Irrigation District were vested property rights, not to be destroyed by executive action (*Wilbur* v. *Burley Irrigation District,* 58 Fed. 2nd 871, 61 App. D. C. 145).

Meantime, in proceedings brought for the purpose, once in the state courts and twice in the federal courts, with all parties in interest before the courts, including the United States and the Secretary of the Interior, the courts of Idaho and of the United States entered identical decrees allocating all of the waters of Snake River. Those decrees allocated 2,700 second-feet of water to the power plant for power purposes (R. p. 196 par. 56; Pl. Ex. 2, pp. 27, 28, 32, 33; Pl. Ex. 3, pp. 10, 11). This amount of water is sufficient to generate enough electric power and enough

electric energy to supply all demands for electric power on the Project, during the non-irrigation season (R. pp. 23, 101, par. 30).

Thereafter, in 1934, the present Secretary of the Interior shut off the 2,700 second-feet of water from the power plant during the non-irrigation (winter) season, stored the water in American Falls Reservoir (a reservoir in which the Burley Irrigation District has no right either to store, or use, water stored therein) and brought in power from a private utility company to supply the power demands on the Project (R. pp. 25-29, 102 pars. 34, 35; R. p. 341). As a result of the sale of this power, the Secretary deducted from the proceeds of the sale of power on the Project, the sum of $50,000, and thereby came into possession of the sum of $50,000. Through a complicated series of contracts, and computations, the Secretary proposed to credit this $50,000 to another power plant (Black Canyon) some 250 miles distant (R. pp. 32, 102 par. 36; R. pp. 86-93; R. pp. 23, 101 par. 31; R. pp. 71-79). Petitioner was not a party to these contracts.

Thereupon the Burley Irrigation District brought suit, alleging that it was the equitable owner of the power plant; that by reason of the decrees of the state and federal courts, 2,700 second-feet of water had become appurtenant to the plant; that the action of the Secretary in shutting off the water without compensation or recourse to judicial process, was an illegal deprivation of a vested property interest; that the $50,000 were the proceeds of this illegal deprivation; that the proposed crediting of the $50,000 to the Black Canyon power plant was a sham; and praying that equity cause the Secretary to credit to the Burley Irrigation District these proceeds from the illegal conversion of its vested property interests (R. pp. 1-37). The District Court of the United States for the District of Columbia dismissed the bill, (R. p. 208) and the United States Court of Appeals for the District of Columbia affirmed the judgment of the lower court (R. pp. 333-350).

QUESTIONS PRESENTED.

The questions in this case are:

1. If a person agrees to pay and does pay, in accordance with the agreement, the cost of a power plant, does he acquire any property right in the plant?

2. If a person agrees to pay and does pay, in accordance with the agreement, the cost of constructing a power plant and by reason of such payment it is determined that he is entitled to a percentage of the profits from the sale of electrical energy generated by the power plant, can it be said judicially that he has a property right in the profits, but has no property right in the power plant?

3. If a person has a vested property interest in a power plant and in water which has been judicially decreed to be appurtenant to the plant and necessary for its operation, can the Secretary of the Interior of the United States deprive such person of the water, prevent the operation of the plant, and the production of profits therefrom, without recourse to judicial process and compensation for such deprivation?

4. If a person be illegally deprived of the use of property in which he has a vested right, and is thereby prevented from making a profit, is he entitled to the proceeds of the illegal conversion?

5. If both Federal and State courts of competent jurisdiction decree a fixed amount of water for use for power purposes at a power plant constructed as a part of a reclamation project, can the Secretary of the Interior shut off and store the water, without the consent of the person who paid for, or agreed to pay for, the power plant, use the water for irrigation of lands to which the cost of the power plant was not charged, without recourse to judicial process and without compensation?

6. Can the Secretary of the Interior legally deprive a person of the use of a power plant for which he has paid, or agreed to pay, and continue to demand and receive payment of the installments of the construction costs as the same become due under the contract?

STATEMENT OF JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on September 30, 1940 (R. p. 333). The decision of the United States Court of Appeals for the District of Columbia will result in depriving petitioner of its property without due process of law, in violation of the Fifth Amendment. This Court has jurisdiction to review the judgment in question under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the District of Columbia, in this case, has decided questions of substance relating to the construction and application of the due process clause of the Fifth Amendment of the Constitution of the United States and statutes enacted by Congress, which have not been, but should be, settled by this Court.

2. The United States Court of Appeals, in this case, has decided that landowners and entrymen who have over a long period of years paid the costs of construction of a power plant on a reclamation project, have no property rights in the power plant.

3. The United States Court of Appeals, in this case, has decided that persons may be deprived of vested property rights by the Secretary of the Interior, without resort to judicial process and the payment of just compensation.

4. The decision of the United States Court of Appeals holds, in effect, that water rights judicially decreed for a particular beneficial use on a reclamation project may be taken by the Secretary of the Interior, without resort to judicial process and the payment of just compensation. This decision is in conflict with the decision of this Court in *Ickes* v. *Fox,* 300 U. S. 82, which holds that, although the United States is the diverter, storer and distributor of the water, the water decreed and used for irrigation purposes is an appurtenance to the land to which it is beneficially applied and that, therefore, the water rights are the property of the landowners. The decision is also in conflict with the Idaho Code Annotated, Section 41-101, which provides that water beneficially applied shall become an appurtenance of the "land or other thing to which, through necessity, said water is being applied." The decision is in conflict with the decisions of the Supreme Court of Idaho in *Montpelier Milling Co.* v. *City of Montpelier,* 19 Idaho 212, 113 Pac. 741, and *Basinger* v. *Taylor,* 30 Idaho 289, 164 Pac. 522, which hold that the use of water for power purposes is a beneficial use and the right to such water is a property right which cannot be taken without just compensation under the Constitution of Idaho. The decision is in conflict with the Act of Congress, approved July 26, 1866, 14 Stat. 253, Title 43 U. S. C. A. 661, which provides that when rights to the use of water have vested and are recognized and acknowledged by local customs and laws and the decisions of courts, the possessors and owners of such rights shall be maintained and protected in the same.

5. The decision of the United States Court of Appeals is of public interest and importance, in that it involves the question whether landowners and entrymen who, under the Federal Reclamation Laws, have been charged with and are paying the cost of construction of a power plant on a reclamation project, have acquired an equitable property interest which is protected by the due process clause of the Fifth Amendment against confiscation by the Secretary of

the Interior. The Reclamation Laws contemplate the use of a revolving fund for the construction of projects and that after landowners and entrymen have paid, in periodic installments, the costs of construction, the projects and facilities are to be turned over to them. This Court should determine whether the Secretary of the Interior while these payments are being made and after substantial sums have been paid, may destroy the value of the interests thus acquired by the landowners and entrymen, without compensation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7522, *Burley Irrigation District, a corporation, Appellant,* v. *Harold L. Ickes, Secretary of the Interior, Appellee,* and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

BURLEY IRRIGATION DISTRICT.

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